IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 29TH MARCH 2007 / 8TH CHAITHRA 1929

CMA.No. 276 of 1995()

AS.148/1987 of DISTRICT COURT,TRIVANDRUM

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APPELLANTS/PETITIONERS/JUDGMENT DEBTORS:

HARMAN D CRUZ, KARUNALAYAM, VALIYATHURA
ON BEHALF OF HIMSELF AND ON BEHALF OF THE 1ST JUDGMENT DEBTOR FRANCIS KALATHRON D CRUZ AS HIS POWER OF ATTORNEY HOLDER. (DIED. LRS IMPLEADED).

ADDL.APPELLANTS 2 TO 8

A2 MADONA D'CRUZ, WIDOW OF HERMAN D'CRUZ
FRANCIS KALATHRON D'CRUZ, S/O. LATE HERMAN.

A3 FRANCIS KALATHRON D'CRUZ, S/O. LATE HERMAN D'CRUZ

A4 JUTE MANOJ D'CRUZ, D/O. LATE HERMAN D'CRUZ.

A5 NIRMALA KARUNA D'CRUZ, D/O. LATE HERMAN D'CRUZ.

A6 LINUS VEERAN D'CRUZ, S/O. LATE HERMAN D'CRUZ.

A7 HENRY PRIYAN D'CRUZ, S/O. LATE HERMAN D'CRUZ.

A8 JOSEPHINE, KAVITH SAM, D/O.LATE HERMAN D'CRUZ.

ALL ARE RESIDING AT KARUNALAYAM, VALIYATHURA, THIRUVANANTHAPURAM.

(3RD APPELLANT HEREIN IS REPRESENTED BY THE POWER OF ATTORNEY HOLDER THE 7TH APPELLANT).

THE LEGAL HEIRS OF DECEASED 1ST APPELLANT ARE IMPLEADED AS ADDITIONAL APPELLANTS 2 TO 8 AS PER ORDER DATED 27.11.2000 ON CMP 5971/2000.

BY ADV. SRI.V.CHITAMBARESH
SMT.SINDHU MANOJ.
SRI.SHAMIER MARICKAR

RESPONDENTS/RESPONDENTS-COUNTER PETITIONERS:
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1. MRS. JOSEBEL ALBERT, RESIDING IN FLAT NO.14, BUILDING NO.161, KALINA BOMBAY.

2. LIBIYAN MICHAEL RESIDING AT DO. DO.

3. STANCY DAUGHTER OF PAUL ALBERT ROZARIO OF DO.DO.

4. JULITA FERNANDEZ OF DO. DO.

5. PAUL ROZARIO OF DO. DO.

6. ESUBIA ROZARIO OF DO. DO.

7. JOANNA ROZARIO OF DO. DO.

8. DOMINIC ROZARIO OF DO. DO.

RESPONDENTS 2 TO 8 ARE REPRESENTED BY THEIR MOTHER FIRST RESPONDENT.

BY ADV. SRI.P.V.RAMESH SHANKAR
SRI.G.P.SHINOD
SRI.G.UNNIKRISHNON

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 29/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP NO. 3921/1995 IN CMA 276/1995

DISMISSED

29.3.2007 SD/- M.SASIDHARAN NAMBIAR, JUDGE

M.SASIDHARAN NAMBIAR, J.

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CMA.No. 276 OF 1995

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DATED THIS THE 29TH DAY OF MARCH, 2007

JUDGMENT

Respondents obtained a decree for recovery of possession against revision petitioners. They filed an appeal. During the pendency of the appeal, respondents filed an application for temporary injunction to restrain appellants in the first appeal from demolishing the building directed to be recovered and an order of injunction was granted. Respondents in the appeal contended that in violation of the order, the building was demolished. I.A.700 of 1987 was filed for appointment of a Receiver. While appointing the Receiver, first appellate court, on 20.5.1987, directed construction of the demolished building. It was provided that the work has to be completed and the amounts spent by respondents will be certified by the Receiver and respondents will be entitled to realise the amounts certified from the appellants irrespective of the result of the appeal. After completing the work, respondents filed E.P.2 of 1987 for attachment and sale of the property for the amount certified by the Receiver and cost. The executing court directed attachment. That order was challenged before this court in CRP 454 of 1990. This court dismissed the CRP

holding that respondents are entitled to realise the amount as certified by the Receiver. In the execution petition, appellant filed an objection on 20.3.1994 contending that as second appeal is pending against the decree, the execution petition is not maintainable and the right available to appellant is not one half right but whole right. The executing court, after hearing the parties, posted the execution for settlement of proclamation holding that objections raised are not available at that stage. While execution petition was posted for steps, Bank filed E.A.1 of 1990 for incorporating the charge available to the Bank in respect of the property to be sold, in the sale proclamation. That was allowed and decree holder was directed to amend the sale papers. Subsequently, execution petition was posted for proclamation and sale to 22.10.1994. As there was no bidders on the application filed by decree holder, upset price of Rs.1,00,000/- originally fixed was reduced to Rs.65,000/- and sale was proclaimed to 15.11.1994. On that day it was sold for Rs.65,000/- and purchased by the decree holder. Thereafter appellant filed E.A.1 of 1995 under Rule 90 of Order XXI, to set aside the sale alleging irregularity. As per order dated 24.1.1995, learned District Judge dismissed the application and thereafter confirmed the sale. The order in

E.A.1 of 1995 is challenged in this appeal.

2. The learned counsel appearing for the appellant and respondent were heard.

3. When the appellant raised allegations with regard to irregularities in the sale and a petition under Rule 90 of Order XXI was passed, the execution court is bound to consider the objection and also the merit of the contentions raised in the application and decide whether the sale is to be set aside or not. Unfortunately, learned District Judge did not consider the objections. The order reads :-

> **"Counter filed. Heard. The grounds alleged in the petition does not arise for consideration at this stage to set aside sale. Hence petition dismissed with costs".**

4. As the learned District Judge did not consider the objections at all and dismissed the petition for the reason that petition does not arise for consideration at that stage, there is no other alternative than to set aside the order and remand E.A 1 of 1995 back to the District Court for fresh disposal in accordance with law. The learned District Judge has to consider the objections and pass appropriate order in accordance with law.

5. Appeal is allowed. The order dated 24.1.1995 in E.A.1 of

1995 is set aside. E.A.1 of 1995 is restored and remanded to District Court, Thiruvananthapuram for fresh disposal in accordance with law. Parties are directed to appear before the District Court on **1.6.2007**. Send back the records forthwith.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-